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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

In re: HP INKJET PRINTER LITIGATION

Case Number C 05-3580 JF (PVT)

ORDER¹ GRANTING DEFENDANT'S MOTION TO DISMISS

[re: docket no. 38]

I. BACKGROUND

Hewlett-Packard Co. (“HP”) manufactures printing supplies and inkjet printers. Plaintiffs Nicklos Ciolino (“Ciolino”) and Daniel Feder (“Feder”) both own HP printers that use “smart chip” technology.² “Smart chip” technology, according to HP, keeps track of the remaining ink in a cartridge and alerts printer owners when new ink needs to be ordered.

On October 31, 2005, Plaintiffs filed an amended class action complaint against HP. On March 7, 2006, this Court issued an Order granting in part and denying in part HP's motion to dismiss and denying HP's motion to strike. The Court concluded that Plaintiffs did not have standing because they had not alleged an actual injury in connection with their six claims for

¹ This disposition is not designated for publication and may not be cited.

² Ciolino owns a HP PSC 2510 Photosmart printer. Feder did not identify the printer model he owns.

1 relief. In addition, the Court dismissed Plaintiffs' claims for breach of express warranty and
 2 breach of implied warranty. On March 31, 2006, Plaintiffs filed a Second Consolidated and
 3 Amended Class Action Complaint ("SAC").

4 Plaintiffs now allege the following: HP engaged in unfair and deceptive conduct in
 5 connection with the "smart chip" technology in its ink cartridges. HP's "smart chips" are
 6 programmed to indicate prematurely that replacement is needed, when in fact "hundreds of
 7 additional pages" of ink remain. HP's "smart chip" technology also renders cartridges unusable
 8 on a concealed, built-in "expiration date," which is the earlier of thirty months after installation
 9 or thirty months after a factory-set "install-by" date, regardless of the amount usable ink
 10 remaining. HP's "SureSupply" marketing campaign falsely promises consumers an easy way to
 11 maintain adequate printer supplies that saves time and money, while failing to disclose the
 12 premature ink warnings and expiration date discussed above. Plaintiffs allege that "HP has
 13 deliberately withheld from its consumers information about the true functioning of the smart chip
 14 . . ." SAC, ¶¶ 2, 23-28. They allege that they have suffered economic harm because they
 15 discarded usable printer cartridges based on premature low-ink warnings. They allege that they
 16 relied on specific terms of HP's express warranty that were breached by HP. Plaintiffs also
 17 allege that they relied on HP's promotional material in purchasing HP printer cartridges.

18 Plaintiffs allege six claims for relief: (1) breach of express warranty; (2) breach of implied
 19 warranty; (3) unjust enrichment; (4) violations of the California Consumers Legal Remedies Act
 20 ("CLRA"), California Civil Code § 1750 *et seq.*; (5) violations of the California False
 21 Advertising Act ("FAA"), California Business & Professions Code § 17500 *et seq.*; and (6)
 22 violations of the California Unfair Competition Law ("UCL"), California Business & Professions
 23 Code § 17200 *et seq.*

24 On April 21, 2006, HP filed the instant motion to dismiss on the ground that Plaintiffs
 25 lack standing to allege claims arising from the alleged "expiration date" feature of the "smart
 26 chip" technology. Plaintiffs oppose the motion. The Court heard oral argument on June 2, 2006.
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II. LEGAL STANDARD

“A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack, the moving party asserts that the allegations in the complaint are insufficient on their face to invoke federal jurisdiction. *Id.* In a factual attack, the moving party disputes the truth of the allegations in the complaint, which otherwise would be sufficient to invoke federal jurisdiction. *Id.* In resolving a facial attack, the Court accepts the allegations in the complaint as true. *Whisnant v. United States*, 400 F.3d 1177, 1179 (9th Cir. 2005).

III. DISCUSSION

HP argues that Plaintiffs do not have standing to allege claims related to the “expiration date” feature because neither named Plaintiff has experienced an injury-in-fact as a result of this feature. “To establish the ‘irreducible constitutional minimum of standing,’ the plaintiff must demonstrate that there was an injury-in-fact that is fairly traceable to the challenged conduct and that the injury can be redressed by a favorable decision by the Court.” *Muir v. Navy Fed. Credit Union*, 366 F. Supp. 2d 1, 2 (D.D.C. 2005) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The elements necessary to establish standing are “not mere pleading requirements but rather an indispensable part of the Plaintiffs’ case, [and] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.” *Lujan*, 504 U.S. at 512. Article III “requires the party who invokes the court’s authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.” *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (internal quotation marks omitted). Plaintiffs argue that they have alleged both an actual and a threatened injury.

1 **A. Actual Injury**

2 Plaintiffs admit that they “have not yet encountered an expired cartridge.” Plaintiffs’
 3 Opposition, p. 4. However, they argue that they have standing regarding all claims arising from
 4 “smart chips” based on their alleged actual injury from false low-ink warnings. Plaintiffs argue
 5 that the low-ink warnings and expiration date features are “companion features” of the same
 6 “smart-chip” technology and are marketed in the same “SureSupply” campaign. Thus, they
 7 contend that the harm resultant from the low-ink warnings also establishes standing for claims
 8 related to the “expiration date” feature.

9 As Plaintiffs correctly note, “At the pleading stage, general factual allegations of injury
 10 resulting from the defendant’s conduct may suffice, for on a motion to dismiss we presum[e] that
 11 general allegations embrace those specific facts that are necessary to support the claim.” *Lujan*,
 12 504 U.S. at 512 (internal quotation marks omitted). However, Plaintiffs have not made even
 13 *general* allegations of actual injury based on the “smart chip” technology. Rather, the only actual
 14 injury that they have alleged is that the premature “low-ink” warnings have caused them to
 15 discard usable, non-expired cartridges. SAC, ¶¶ 30-33. Moreover, Plaintiffs have expressly
 16 conceded that they have not yet suffered an actual injury as a result of the “expiration date”
 17 feature. Accordingly, the Court concludes that Plaintiffs have not suffered an actual injury-in-
 18 fact traceable to the “expiration date” feature.

19
 20 **B. Threatened Injury**

21 In the alternative, Plaintiffs argue that the threat of future harm resulting from the
 22 “expiration date” feature establishes standing. They argue that, because HP continues to use the
 23 concealed “expiration dates” in printer cartridges, they face an ongoing risk of encountering a
 24 cartridge that will shut down before its ink supply is exhausted. They argue that such an
 25 encounter is now more likely since they are likely to ignore low-ink warnings and use cartridges
 26 longer than they had previously.

27 Three elements are required to establish standing: (1) “the plaintiff must have suffered an
 28 ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and

1 particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” (2) “there must
 2 be a causal connection between the injury and the conduct complained of—the injury has to be
 3 fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the
 4 independent action of some third party not before the court,” and (3) “it must be ‘likely,’ as
 5 opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”
 6 *Lujan*, 504 U.S. at 560-61 (1992) (internal citations omitted).

7 Of these three, Plaintiffs have adequately addressed only the second element. This Court
 8 agrees with Plaintiffs that the threat of injury from the “expiration date” feature is “fairly
 9 traceable” to the conduct of the defendant, because it arises from HP’s alleged inclusion of this
 10 feature in the “smart chip” technology.

11 However, with respect to the first element, the SAC does not include an allegation of an
 12 imminent threat of injury to Plaintiffs’ interests, nor have Plaintiffs alleged facts that might allow
 13 the Court to infer an imminent threat to those interests, such as facts concerning the frequency
 14 with which cartridges expire. In their opposition brief, they suggest that there is an imminent
 15 threat that cartridges they presently own will expire, because they now ignore low-ink warnings
 16 and thus use cartridges longer. Opposition, pp. 6-7. However, Plaintiffs do not attempt to
 17 quantify the likelihood that cartridges will expire or when such expiration will occur. At oral
 18 argument, counsel emphasized the clock starts ticking on cartridges even prior to purchase.
 19 However, the SAC contains no allegations as to how long cartridges actually sit on store shelves.
 20 Imminence is a “somewhat elastic concept,” but “cannot be stretched beyond its purpose, which
 21 is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury
 22 is ‘certainly impending.’” *Lujan*, 504 U.S. at 564 n.2 (citations omitted). This Court concludes
 23 that the Plaintiffs have failed to allege an imminent threat to their interests. Even if they were to
 24 incorporate the points raised in their opposition brief and at oral argument into an third amended
 25 complaint, the Court doubts that their arguments would succeed in alleging a ‘certainly
 26 impending’ injury rather than a speculative one.

27 Relying on *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001), Plaintiffs also suggest that
 28 harm arises from HP’s express warranty. *Armstrong* establishes the proposition that “where the

1 harm alleged is directly traceable to a written policy, . . . there is an implicit likelihood of its
2 repetition in the immediate future.” *Armstrong*, 275 F.3d at 861 (internal citations omitted). In
3 *Armstrong* the written policy of the California Board of Prison Terms failed to comply with the
4 Americans with Disabilities Act. Plaintiffs had suffered past injuries, and the injuries resulted
5 from *following* the written policy. *Id* at 861-63. The instant case is distinguishable from
6 *Armstrong* because Plaintiffs have suffered no past injuries and the alleged threat of future injury
7 is alleged to result from a breach of HP’s warranty rather than from the terms of the policy itself.

8 Accordingly, the Court concludes that Plaintiff’s arguments with respect to threatened
9 future harm are insufficient to establish standing to allege claims arising out of the “expiration
10 date” feature of the “smart chip.”

11

12 **IV. ORDER**

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14 Good cause therefore appearing, IT IS HEREBY ORDERED HP’s motion to dismiss is
15 GRANTED. This determination is without prejudice to Plaintiffs’ seeking leave to reassert the
16 dismissed claims should new facts emerge in discovery or otherwise.

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18 DATED: June 6, 2006

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20 JEREMY FOGEL
21 United States District Court

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